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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

QUINN MILLET,	:	
Plaintiff/Appellant,	:	Case No. 20051106
vs.	:	
LOGAN CITY, D's BRIDGERLAND APARTMENTS, and CACHE AUTO BOOTING SERVICE,	:	
Defendants/Appellees.	:	

BRIEF OF APPELLEE LOGAN CITY

Appeal from a Judgment entered in the First Judicial District Court, Cache County, State of Utah, Honorable Judge Gordon J. Low, Presiding

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UTAH

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STATEMENT OF JURISDICTION

The Appeal Court has jurisdiction pursuant to Utah Code 78-2a-3(2)(j).

STATEMENT OF ISSUES

Did the trial court err in dismissing the Plaintiff's Complaint as against Logan City pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure, for failure to state a claim against Logan City upon which relief could be granted.

When reviewing a trial court's grant of a rule 12(b)(6) motion to dismiss, the appeals court must accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff. Alvarez v. Galetka, 933 P.2d 987, 989 (Utah 1997) (quoting St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991)). Because the propriety of a

12(b)(6) dismissal is a question of law, the appeals court should give the trial court's ruling no deference and review it under a correctness standard. Id.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Fourteenth Amendment to the Constitution of the United States of America, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I Section 7 Constitution of Utah

> No person shall be deprived of life, liberty or property, without due process of law.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Logan City Ordinance no. 2000-75 (The full text of the ordinance is set forth in Plaintiff/appellants Addendum at pages 19 through 21)

STATEMENT OF THE CASE

Nature of the Case. The Complaint appears to challenge the constitutionality of a Logan City ordinance that regulates the practice of "booting" cars in Logan City. The Complaint also contains a claim against two private entities-- a booting company and a

landlord. The Complaint is brought pursuant to 42 U.S.C. § 1983 and Article I Sec. 7 of the Constitution of the State of Utah. The Complaint alleges that the ordinance violates the due process clause of both the State and Federal constitutions.

Course of Proceedings. The Plaintiff filed a Motion for Summary Judgment. All Defendants filed Motions to Dismiss. Oral arguments were held on all motions.

Disposition at Trial Court. The District Court denied Plaintiff's Motion for Summary Judgment and dismissed the Complaint against all of the Defendants.

RELEVANT FACTS WITH CITATION TO THE RECORD

Because the Complaint was dismissed upon Motion made pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure all of the facts alleged in the Complaint are presumed to be true. The following facts are alleged in the Complaint and are relevant to Logan City and this appeal.

1. The only factual allegation in the Complaint against Logan City is that the City enacted an ordinance that regulates the practice of immobilizing a motor vehicle for purposes of parking enforcement("booting"). (Complaint ¶ 4, Appellant's Addendum pg. 3)
2. The Plaintiff's claim of liability against Logan City is brought pursuant to 42 U.S.C. § 1983. (Complaint ¶ 1, Appellant's Addendum pg. 3).
3. The Complaint alleges that the City's co-defendants, Cache Auto Booting Service and D's Bridgerland Apartments, Inc., booted Plaintiff's motor vehicle, under authority of the Ordinance. There are no allegations in the Complaint that the City,

or its agents or employees, booted the Plaintiff's motor vehicle. (Complaint ¶ 5, Appellant's Addendum pgs. 3 and 4).

SUMMARY OF THE ARGUMENT

The district court was right to dismiss the Complaint as against Logan City. A claim brought under 42 U.S.C. § 1983 requires the Plaintiff to plead and prove that he was deprived of some federal constitutional or statutory right under color of law. The Plaintiff alleges he was deprived of his property without due process of law. Some state action is necessary for there to be a violation of the right to due process or for conduct to be deemed to be under color of law. The facts alleged in the Complaint do not, as a matter of law, add up to either a violation of due process rights or state action.

ARGUMENT

POINT ONE

THE COMPLAINT DOES NOT STATE A CLAIM UNDER 42 U.S.C. §1983 AGAINST LOGAN CITY BECAUSE THERE WAS NO STATE ACTION INVOLVED IN THE BOOTING OF HIS MOTOR VEHICLE

The Complaint does fail to state a claim against Logan City upon which relief can be granted. The Plaintiff brings his claims under 42 U.S.C. §1983. To state a claim for relief under §1983, the Plaintiff must establish that he was deprived of a right secured by the United States Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of §1983 excludes from its reach "'merely private conduct, no matter how discriminatory or wrongful,'" Blum v. Yaretsky, 457 U. S. 991, 1002 (1982) (quoting Shelley v. Kreamer, 334 U. S. 1, 13 (1948).

In order for the Plaintiff to state a cause of action based on a Fourteenth Amendment violation, the challenged conduct must constitute both color of law and state action. This requirement stems from section 1983 "color of law" limitation as well as from the state action language of the Fourteenth Amendment itself. For all practical purposes, according to the United States Supreme Court, "color of law" and state action are the same where Fourteenth Amendment violations are involved. See Lugar v. Edmondson Oil Co., Inc. 457 U.S. 922 (1982). This means that section 1983 regulates state and local governmental conduct, as distinct from purely private conduct.

The Plaintiff's complaint was properly dismissed because there is no state action involved in the booting of Plaintiff's car. The complaint alleges that the Plaintiff's car was booted by Cache Auto Booting Service at the behest of Bridgerland Apartments, Inc. (Complaint ¶ 5, Appellant's Addendum pgs. 3, 4). While the complaint also alleges that this was done under color of the authority of the challenged City Ordinance (Complaint ¶ 5, Appellant's Addendum pg. 4), there are no factual allegations in the Complaint to support this allegation and the language of the ordinance itself will not support the allegation that the "booter" acted at the request of Logan City.

The United States Supreme Court has established several tests in modern Court decisions to determine when state action exists. The Court has found that mere state regulation of private conduct, even if extensive, is insufficient to support a finding of state action; state authorization of private conduct does not make the private party a state actor; to find state action, the state must participate in, order, coerce, or significantly encourage

the contested activity; state assistance to a private party, even if substantial, will not support a finding of state action, whether that assistance is in the form of direct financial aid, tax exemptions, monopoly power, or the grant of a license; the mere importance of a function carried out by the private sector is an insufficient basis upon which to find state action; and that for state action to be found, the function must be historically, traditionally, and exclusively governmental, (*See* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999), San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S.345 (1974); Moose Lodge v. Irvis, 407 U.S. 163 (1972)).

The Ordinance does not authorize or require private booting. It regulates it. Section 10.52.040A of the Ordinance authorizes the Logan Police to boot and to tow nuisance vehicles off of the public streets. (Appellant's Addendum pg. 19). Section 10.52.040D of the Ordinance makes it unlawful to boot a vehicle without complying with the Ordinance and regulates the practice of booting. Section 10.52.040E requires that booting companies license with the City and limits the amount that they can charge. Section 10.52.040F requires landlords to provide certain information to their tenants regarding booting.

There is nothing in the Ordinance that affirmatively authorizes booting, other than by the City of Logan under limited circumstances that are not relevant to this

Complaint. There are no factual allegations in the Complaint that any employee of Logan City booted the Plaintiff's car; that Logan City knew in advance about the booting; that Logan City authorized the booting; or that Logan City ever had custody of the Plaintiff's car or money. There are no facts in the Complaint that if proven true, would constitute state action for purposes of Plaintiff's section 1983 claim. The Complaint against Logan City was properly dismissed for this reason.

POINT TWO
EVEN IF THERE WAS STATE ACTION THE PLAINTIFF WAS NOT DEPRIVED OF HIS DUE PROCESS RIGHTS

Even assuming that there was state action involved in the booting of Plaintiff's car the ordinance is still constitutional and Plaintiff was not denied either procedural or substantive due process of law under either the state or federal constitutions.

Procedural Due Process. The Plaintiff alleges that the Ordinance unconstitutionally violates the procedural due process provisions of the state and federal constitution because the Ordinance does not provide for a pre- deprivation notice and hearing. The Plaintiff is wrong in his assumption that a pre-deprivation notice and hearing is constitutionally required.

Due process is a fluid concept. The Utah Supreme Court has said due process is not a technical conception with a fixed content unrelated to time, place, and circumstances but a flexible concept based on fairness. See V-1 Oil Co. v. Department of Envtl. Quality, 939 P.2d 1192, 1196 (Utah 1997) and Dairy Product Services, Inc. v. City of Wellsville, 2000 UT 81, ¶ 49, 13 P.3d 581, pg 593.

This flexibility allows due process to be satisfied in City initiated booting and towing by the availability of a post deprivation hearing on the underlying traffic offense. If there were state action in the booting of Plaintiff's motor vehicle, it would be the equivalent of a police office booting or towing a motor vehicle for parking enforcement. In Goichman v. City of Aspen, 859 F.2d 1466 (1988) the Tenth Circuit Court of Appeals found that the reasonable availability of a post towing hearing, to adjudicate a parking violation, satisfied a car owner's right to due process and that no additional hearing was required to determine the validity of a city's impoundment and towing procedure.

In City of Los Angeles v. David, 538 U.S. 715 (2003) the United States Supreme Court reviewed a decision challenging the City of Los Angeles towing of an individual's car without an expeditious pre or post towing hearing. The Supreme Court found that the actions of the City complied with due process of law. The Court relied on the case of Mathews v. Eldridge, 424 U. S. 319 (1976). In Eldridge the Court set forth three factors that normally determine whether an individual has received the "process" that the Constitution finds "due". The Court considered:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would
> entail. Id., at 333.

In City of Los Angeles v. David, the "private interest," was the loss of use of the car for a period of time. This is the same interest involved in this case. In City of Los Angeles v. David the second factor--concern for accuracy– was found to not require a due process pre-deprivation hearing because a relatively speedy hearing or trial regarding the merits could be had following the towing of the car. In the case before this court a relatively quick hearing, in either traffic court or small claims court, regarding the booting is available to the Plaintiff, and the straightforward nature of the issue--whether the car was improperly parked--indicates that initial booting errors, while they may occur, are unlikely. The third factor considered in City of Los Angeles v. David--the "government's interest"--argues strongly in the Logan ordinance's favor. Just as in the City of Los Angeles case, it would be an administrative nightmare to require the City to give notice and prior hearing before any towing or booting of a private motor vehicle could take place.

Substantive Due Process. Plaintiff's Complaint contains several allegations against Logan City that can appear to be in the nature of a substantive due process claim. (Complaint ¶¶ 13-22, Appellant's Addendum pgs. 9-14). The Complaint, although not entirely clear, seems to allege that Plaintiff's due process was violated because the City Council did not choose to protect the Plaintiff from private booting when the City enacted the Ordinance, but rather just regulated the practice of booting. It is apparent from the Complaint that the Plaintiff's quarrel with the City stems from this decision to regulate rather than to ban booting. This failure to protect the Plaintiff from booters is not sufficient to state a claim of violation of Plaintiff's substantive due process rights.

"Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989); see also Seamons v. Snow, 84 F.3d 1226, 1235-36 (10th Cir. 1996) (rejecting § 1983 claim, based on lack of state action, where the school failed to protect student from taunting and hostility by fellow students). A "failure to protect" claim under the Constitution is a substantive due process claim. The ultimate standard for evaluating a substantive due process claim is whether the challenged government action "shocks the conscience" of federal judges. Uhlrig v. Harder, 64 F.3d 567, 573 (10th Cir. 1995) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992)). The courts look to the following three factors to determine whether the government conduct shocks the conscience of a federal judge: (1) the need for restraint in defining the scope of substantive due process claims; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting public safety. Id. (citations omitted). The federal courts have held that ordinary negligence does not shock the conscience, DeAnzona v. City & County of Denver, 222 F.3d 1229, 1236 (10th Cir. 2000) (citing DeShaney, 489 U.S. at 202), and that even permitting unreasonable risks to continue is not necessarily conscience shocking, Uhlrig, 64 F.3d at 574 (citing Collins, 503 U.S. at 128). Rather, a plaintiff "must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." Id.

Even if the City did everything it is alleged to have done and made the mistakes in enacting the Ordinance that the Complaint alleges, the Plaintiff would not have a substantive due process claim against the City. The City's alleged misconduct simply does not "shock the conscience." The conduct of the City in considering and enacting the Ordinance, is typical legislative conduct. There is nothing outrageous or illegal about the considerations the City Council engaged in when it considered the Ordinance and its possible permutations. The Plaintiff's Complaint clearly indicates a political gripe about what the City Council did or did not choose to regulate in the Ordinance and not a legally cognizable cause of action against the City. The claims against the private parties should have been brought as typical state tort claims and not as constitutional violations.

CONCLUSION

Logan City's Motion to Dismiss was properly granted by the District Court. Even assuming all of the factual allegations in the Complaint are true, there is no cause of action stated against Logan City. Plaintiff has clearly not stated a claim under the Due Process Clause of either state or federal constitutions and there was no state action involved in the booting of his motor vehicle.

Dated this 1 day of May, 2006.

David L. Church
Attorney for Logan City

MAILING CERTIFICATE

The undersigned certifies that true and correct copies of the foregoing Brief were mailed, postage prepaid, this 1 day of May 2006 to the following:

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